

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 430

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JOHN F. DAVIS, CLERK

JAMES SAILORS and LORETTA SAILORS; SEYMOUR KONING and MILDRED KONING; GRAZZI MULLAY and ROSALIE MULLAY and THE BOARD OF EDUCATION OF THE CITY OF GRAND RAPIDS, a second class school district; and WILLIAM A. DUTHLER and ANNA M. DUTHLER: HARVEY A. DUTHLER and EDNA M. DUTHLER,

APPELLANTS,

VS.

THE BOARD OF EDUCATION OF THE COUNTY OF KENT, and VICTOR WELLER, DEWEY JAARSMA, MARY I. KEELER, RUSSELL EMMONS and C. B. LEAVER, as members thereof; KENTWOOD PUBLIC SCHOOLS, a fourth class school district, and THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

APPELLEES.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

BRIEF FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF MICHIGAN

ROBERT A. DERENGOSKI,
Solicitor General of the State of Michigan on Behalf of Appellee Frank J. Kelley, Attorney General of the State of Michigan

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**BRIEF FOR APPELLEE ATTORNEY GENERAL OF
THE STATE OF MICHIGAN**

QUESTION PRESENTED

Does the Michigan statute which provides for the election of members of the county (intermediate) board of education by vote of a body composed of 1 member of the board of

education of each constituent school district, who shall be designated by the board of education (popularly elected by school electors) of the constituent school district of which he is a member, deny the equal protection of the laws to the individual appellants where neither the Michigan Constitution nor any State statute confers a vote upon them for the office of member of the county (intermediate) board of education, and does such question present a substantial Federal question for determination by this Court?

ARGUMENT

I

Reynolds v. Sims

The Attorney General of Michigan, intervening appellee herein, advises at the outset that the principles set forth in *Reynolds v. Sims*, 377 U.S. 533, 12 L. ed 2d 506, 84 S Ct 1362, have been endorsed by him even prior to the issuance of *Reynolds*. See *Scholle v. Secretary of State*, 367 Mich 176, certiorari denied by this Court June 22, 1964, sub nom *Frank D. Beadle et al., Petitioners v. August Scholle et al.*, 377 U.S. 990, 12 L ed 2d 1043, 84 S Ct 1901; and *William C. Marshall et al., Appellants, v. James M. Hare, Secretary of State of Michigan, et al.*, 378 U.S. 561, 12 L ed 2d 1036, 84 S Ct 1912.

The Attorney General of Michigan sets forth that if the individual appellants had and have an absolute right to vote for members of a Michigan county (intermediate) board of education then of course *Reynolds* must be invoked.

In *Belles v. Burr*, 76 Mich 1, 43 NW 24, it was held (76 Mich 11, 43 NW 28):

“Viewing the questions historically, it is apparent that for 50 years it has never been considered that the qualifications of voters at school-district meetings must be identical with those prescribed in the Constitution as qualifications of electors entitled to vote under that instrument. The authority granted by the Constitution to the Legislature to establish a common or primary school system carried with it the authority to prescribe what officers should be chosen to conduct the affairs of the school-districts, to define their powers and duties, their term of office, *and how and by whom they should be chosen* (emphasis supplied).

“School-districts are regarded as municipal corporations. *School-district v Gage*, 39 Mich 484; *Seeley v Board of Education*, Id. 486. As such they preceded the Constitution (*Stuart v School-district*, 30 Mich. 69), and were recognized by that instrument (Const. 1835, Art. 10, § 3; Const. 1850, Art. 13 § 5). But no officer of the school-district is mentioned or recognized by that instrument. The reason is that the whole primary school system was confided to the Legislature, and it cannot be said that the officers of school-districts, chosen pursuant to the system adopted by the Legislature, are constitutional officers. The Constitution provided for no municipal subdivisions smaller than towns, except cities and villages, and it authorized the Legislature to incorporate these. Const. 1850, Art. 15, § 13.”

After 127 years it has never been considered that the qualifications of Michigan school electors “must be identical with those prescribed in the Constitution as qualifications of electors entitled to vote under that instrument”.

Although since 1951 (Act No. 257 PA 1951), the quali-

fications of Michigan school electors have been the same as those prescribed by the Constitutions of 1908 and 1963, such qualifications have been prescribed by the school code and not by the Constitutions. See Appendix A for the qualifications of school electors found in the school code under the Michigan Constitutions of 1908 and 1963.

The rule of *Belles, supra*, has always been the law of Michigan.

II

State Legislature Controls Educational System in Michigan

In *Attorney General v Detroit Board of Education*, 154 Mich 584, 118 NW 606, the Supreme Court quoted with approval the opinion of the judges of the Wayne County Circuit Court, which, in part, was as follows (154 Mich 590, 118 NW 609):

"Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the Legislature may choose to make it such. The Constitution has turned the whole subject over to the Legislature. *Belles v Burr*, 76 Mich 1."

We quote from *MacQueen v Port Huron City Commission*, 194 Mich 328, 160 NW 627, as follows (194 Mich 336, 160 NW 629):

"Fundamentally, provision for and control of our public school system is a State matter, delegated to

and lodged in the State legislature by the Constitution in a separate article entirely distinct from that relating to local government. The general policy of the State has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers independent of the local government with which, by location and geographical boundaries, they are necessarily closely associated and to a greater or less extent authorized to cooperate. Education belongs to the State. It is no part of the local self-government inherent in the township or municipality except so far as the legislature may choose to make it such. *Belles v Burr*, 76 Mich 1 (43 NW 24); *Attorney General v Board of Education*, 154 Mich 584 (118 NW 606). The general school laws were carefully planned and enacted to guard that distinction; provision was made for organization of the common school districts, with officers elected at school meetings by electors with defined qualifications, and who as a school board were given large plenary powers and control of school matters, practically independent from the local government of municipalities in which the schools were situated."

Ruppert v Township School District, 252 Mich 482, 233 NW 387, quoting from *MacQueen, supra*, at page 336 (252 Mich 486-7, 233 NW 389); *Jones v Grand Ledge Public Schools*, 349 Mich 1, 84 NW 2d 327, also quoting *MacQueen, supra*, at page 5 (84 NW 2d 329) and *Lansing District v State Board of Education*, 367 Mich 591, 116 NW 2d 866.

- (a) Historically the Michigan Legislature has prescribed that members of the boards of education of the various classifications of school districts be elected at large

In Michigan, in addition to a handful of school districts created by special acts of the legislature, known as special act school districts, there are 5 classifications of school districts, namely: primary school districts, fourth class school districts, third class school districts, second class school districts and first class school districts. The School Code of 1955, § 2; CL 1948, § 340.2; MSA § 15.3002. By statutory school census requirements, Detroit is the only first class school district and Grand Rapids and Flint are the only two second class school districts. The members of the boards of education of all 5 classifications of school districts are elected at large. This is recognized by District Judge Fox, in his dissent, when he said (254 F Supp 24, Jurisdictional Statement, Appendix B, p. 15a): "For even though members of local school districts are elected by popular election, the election of the 5 members of the Intermediate Board is by majority vote of the constituent school districts in the county, regardless of the respective populations of the several school districts."

- (b) County (intermediate) school districts were first created in 1935, are state agencies distinct from the 5 classifications of school districts and did not supersede or replace such school districts

County (intermediate) school districts were first created by Act No. 117 of the Public Acts of Michigan of 1935, known as "the County School District Act" (CL 1948, § 388.171, et seq, MSA § 15.161, et seq).

Section 2 of the 1935 act (CL 1948, § 388.172; MSA § 15.162) specifically provided that:

“Said county school district shall include all the territory of the county but it shall not supersede nor replace any of the school districts organized and operating under laws enforced at the time of the passage of this act, nor shall it control or otherwise interfere with the rights of said school districts, except as hereinafter provided in this act.”

(c) In creating county boards of education, the Legislature, exercising its plenary power over education under the Constitution, did not provide for the popular election of members of the boards of education of such county school districts

In creating county school districts, the Legislature, acting under its plenary constitutional power, did not provide for the popular election of members of the boards of education of such county school districts. Rather, it was provided that the 5 members of each county board would be chosen at a meeting in the county of representatives from each of the constituent local school districts. In 1962 the Legislature provided for a referendum on the popular election of members of intermediate boards of education. Act No. 190 of the Public Acts of 1962, effective March 28, 1963, as amended by Act No. 290 PA 1964 and Act No. 52 PA 1965 (§§ 294b through 294h, CL 1948 340.294b, et seq; MSA § 15.3294 (2), et seq.

In the recent 1962 case of *Lansing District v State Board of Education*, *supra*, a transfer of territory between school districts was involved and one of the questions presented was the following (367 Mich. 594, 116 NW 2d 868):

"3. Is section 461 of the school code unconstitutional as denying to plaintiff the equal protection of the laws, in that it grants a vote on the question of transfer of territory to the districts from which detachment is made, while denying a vote to the district to which the territory is transferred?"

In disposing of this question, Mr. Justice Kavanagh, writing for a unanimous court, held (367 Mich 599, 116 NW.2d 870):

"The third question raised by plaintiff school district is whether section 461 of the school code of 1955 is unconstitutional as denying to plaintiff the equal protection of the laws in that it grants a vote on the question of transfer of territory to the district from which detachment is made, while denying a vote to the district to which the territory is transferred.

"Plaintiff does not question that the authority to alter boundaries may be delegated without the consent of the inhabitants of the territory annexed or the municipality to which it is annexed, or even against its express protest. Its claim is that to deny one district a vote with reference to the transfer and permit a vote in the other district is to deny the equal protection of the laws contrary to the provisions of both the State and Federal Constitutions. These objections have been disposed of against plaintiff's contention by the following decisions, which we content ourselves with citing: *Hunter v City of Pittsburgh*, 207 US 161 (28 S Ct 40, 52 L ed 151); *Attorney General, ex rel Battishill, v Springwells Township Board*, 143 Mich 523.

"In order to deny the equal protection of the laws contrary to the provisions of the State and Federal

Constitutions, it would be necessary for the electors in plaintiff school district to have an absolute right to vote on the annexation question. The above mentioned decisions clearly indicate they do not have such a right. The legislature is the only body that could give plaintiff school district such a right. This it has omitted. Not being entitled to the right, the fact that it is given to one district and not to the other does not deny the equal protection of the laws contrary to the provisions of the State and Federal Constitutions."

The Michigan Legislature has not given the individual appellants the absolute right to vote for members of county (intermediate) boards of education. The legislature is the only body that could give appellants such right. This having been omitted, the individual appellants are not entitled to the right.

At least since *Belles, supra*, it has been the law of Michigan that the legislature, under the various Constitutions of Michigan, has plenary power to determine how school board members should be chosen and upon what matters school electors could vote. Whether a school elector has or has not the right to vote for members of a county (intermediate) school district is of State concern only.

III

The transfer of territory to appellee Kentwood Public Schools should stand

Should the Court agree with appellants, appellee urges the Court to affirm the unanimous decision of the District

Court allowing the transfer of territory to appellee Kentwood Public Schools to stand.

The transferred territory was originally a part of the Kentwood school district and only became a part of the Grand Rapids school district by operation of law, ~~supra~~, ~~pp. 9-14~~. The county board of education transferred the territory back to Kentwood and the State Board of Education on appeal set aside the action of the county board and entered its own order transferring somewhat less of the territory to Kentwood.

The transferred territory has a tax base of over five million dollars and a modern, 14-classroom elementary school is located thereon.

Judge Fox held (254 F Supp 26; Jurisdictional Statement, App. B, p. 20a):

"Following the well established principle that acts of a *de facto* body have full legal effect, the Court is not disposed to grant plaintiffs this facet of the relief they seek. The possible harm in setting a precedent of this sort, even on the facts of this case, is viewed as more to be shunned than the harm resulting to individual plaintiffs by allowing the transfer to stand. Orderly functioning of government demands no less. See *Johnson v Genesee County*, 232 F Supp 567 (E.D. Mich, 1964); *Scholle v Hare*, 367 Mich 176, 116 NW 2d 350; *Williams v Secretary of State*, 154 Mich 447, 108 NW 749; and *State v Sylvester*, *supra*.

"The preferable course is to allow a properly apportioned body to remedy whatever ills have come

about by acts of its malapportioned state, and this is the policy which this court will follow."

Judges O'Sullivan and Kent concurred with Judge Fox, holding (254 F Supp 28, Jurisdictional Statement, App. A, p. 1a):

"We find ourselves in a position where we concur with Judge Fox, writing for the Court, in reaching the conclusion that this Court will not overturn the acts of the de facto Kent Intermediate Board."

The transfer to Kentwood Public Schools should stand.

CONCLUSION

The Attorney General of Michigan seeks dismissal of this appeal on the basis that appellants have no absolute right to vote for members of a county (intermediate) board of education. Should the Court find that such right does exist then the Attorney General urges that the one-man one-vote principle enunciated in *Reynolds* be invoked, and in any event the Attorney General urges that the Court affirm the unanimous decision of the District Court allowing the transfer of territory to appellee Kentwood Public Schools.

Respectfully submitted,

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APPENDIX A

THE QUALIFICATIONS OF SCHOOL ELECTORS

Chapter 4, part 2, of The School Code of 1955, as last amended by Act No. 257 of the Public Acts of 1951, with reference to school elections and the qualifications of school electors under the 1908 Constitution, provided as follows:

School electors; qualifications. Section 1. A school elector shall possess the qualifications provided for qualified electors in section 1, article 3 of the constitution (1908): Provided, That upon questions involving the direct expenditure of public moneys or the issue of bonds, school electors shall possess the qualifications provided in section 4 of article 3 of the constitution: Provided further, That no person shall vote in any school election unless he shall have resided within the school district at least 30 days next preceding said election. (C.L. '48, § 354.1; C.L. '29, § 7410.)

Chapter 7, part 2, of The School Code of 1955, as amended, with reference to school elections and the qualifications of school electors under the 1963 Constitution, provides as follows:

School electors, qualifications; repeat elections on proposals. (M.S.A. 15.3511)

Sec. 511. A school elector shall possess the qualifications provided for qualified electors in section 1 of article 2 of the constitution (1963) and statutes enacted thereunder. Upon questions involving the increase of the ad valorem tax limitation imposed by section 6 or article 9 of the constitution for a period of more than 5 years or the issue of

bonds, school electors shall possess the qualifications provided in section 6 of article 2 of the constitution. No person shall vote in any school election unless he shall have resided within the school district at least 30 days next preceding the election. The same question or measure involving consolidation of school districts, annexation of entire districts, annexation or transfer of a portion of 1 school district to another, or bonding of school districts, shall not be submitted to the voters of any school district more often than once in 6 months, unless the board is presented with a petition requesting the board to call another election and signed by qualified school electors of the district to the number of not less than 50% of the registered general electors residing in the district as of the date the petition is presented to the board. Any city or township clerk shall certify to the intermediate school district superintendent of schools the number of registered general electors residing in a school district when requested by the intermediate school district superintendent, who shall make the information available to the board of the district.